NO. 77724-1

SUPREME COURT OF THE STATE OF WASHINGTON

VOTERS EDUCATION COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*,

Defendants/Respondents,

and

DEBORAH SENN,

Intervenor.

SUPPLEMENTAL BRIEF OF RESPONDENT PUBLIC DISCLOSURE COMMISSION

ROBERT M. MCKENNA
Attorney General

JEFFREY D. GOLTZ
WSBA No. 5640
Deputy Attorney General
LINDA A. DALTON
WSBA No. 15467
Senior Assistant Attorney General
CAROL A. MURPHY
WSBA No. 21244
Deputy Solicitor General
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-9006
Attorneys for Defendants/Respondents, State of Washington, State Public Disclosure Commission et al.

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

In *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed.2d 491 (2003), the United States Supreme Court upheld the constitutionality of §203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. §441b, that prohibited broadcasting "electioneering communications" right before an election when the corporation or labor union used its general treasury funds to pay for the ads. However, after the Court determined that *McConnell* did not preclude an as-applied challenge to that same provision in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410, 126 S. Ct. 1016, 1018, 163 L. Ed.2d 990 (2006) (*WRTL I*), it held that the ads, that urged voters to contact their senators to urge an end to a filibuster, were not the functional equivalent of express advocacy. *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 2007 WL 1804336 (June 25, 2007) (*WRTL II*).

There are two reasons why *WRTL II* supports the position of the Public Disclosure Commission (PDC).[1] First, the discussion of the WRTL ads reveals that the ads sponsored by the VEC fall comfortably within the meaning of express advocacy. Second, because BCRA barred speech,

[1] *WRTL II* did not address the threshold issue in this case of whether Washington's definition of "political committee" in RCW 42.17.020(38), that triggers certain disclosure requirements in RCW 42.17.040-.090, is unconstitutionally vague. *See* Amended Br. of Respondents (PDC Br.) at 17-20; Response of Public Disclosure Commission to Br. of *Amicus Curiae* Chamber of Commerce of United States (PDC Resp. to *Amicus* Chamber) at 1, 5-13.

resulting in less information to the public, the Court's decision is irrelevant to analysis of state statutes, like Washington's, that require only disclosure and provide the public with more information.

II. SUMMARY OF *WRTL II*

In the controlling opinion,[2] Chief Justice Roberts clarified the distinction between issue and express advocacy for purposes of § 203, recognizing that, though the distinction "may often dissolve in practical application," the Court is required "to draw such a line." *WRTL II* at *7.[3] Accordingly, he stated the following as the test:

> [A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

WRTL II at *14. The Chief Justice then focused on characteristics of the WRTL ads that led him to conclude that they were not the functional equivalent of express advocacy.

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[2] There was no majority opinion in *WRTL II*. The majority supporting the judgment consisted of an opinion by Chief Justice Roberts, joined by Justice Alito, opining that, because the ads constituted issue advocacy, it was unconstitutional to apply the BCRA §203 prohibitions to them, and an opinion by Justice Scalia, joined by Justices Kennedy and Thomas, concurring with the judgment but that would have had the Court revisit the *McConnell* decision on the facial constitutionality at §203. Accordingly, this Court should look primarily to the Roberts opinion.

[3] Chief Justice Roberts recognized that any test "must be objective" and focus on the "substance of the communication rather than amorphous considerations of intent and effect." *WRTL II* at *14. Application of the test should involve "minimal if any discovery" so any dispute can be resolved quickly and the test should "give the benefit of any doubt to protecting rather than stifling speech." *WRTL II* at *14. He also spelled out these test criteria in footnote 7 of his opinion, and added that "discussion of issues cannot be banned merely because the issues might be relevant to an election." *Id.* at *17, n.7.

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. Having determined that the broadcasts at issue were not the "functional equivalent" of express advocacy, Chief Justice Roberts evaluated the state interests offered to support the prohibition and concluded that none were "sufficiently compelling." *WRTL II* at *17-20.

III. ARGUMENT

A. The VEC Ads Are Express Advocacy Under *WRTL II*

The *WRTL II* test is almost identical to the test the PDC asserts here, as well as this Court's test from *Washington State Republican Party v. Public Disclosure Comm'n*, 141 Wn.2d 245, 265, 267, 4 P.3d 808 (2000)(*WSRP*). The reasons for finding that the VEC ads were a clear exhortation to oppose candidate Senn apply as well to a determination of whether those ads are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II* at *14. This conclusion is bolstered by *WRTL II* in four ways.

First, comparing the WRTL and VEC ads supports the conclusion that the VEC ads are express advocacy. The content of the VEC ads was

inconsistent with that of genuine issue ads because the ads did not focus on any legislative issue (or executive branch issue for that matter). At the time of the ads, candidate Senn held no public office and was in no position to affect public policy. The VEC ads also did not "urge the public to contact public officials with respect to the matter." *WRTL II* at *14. Rather, the anti-Senn television ads criticized the candidate and silently pointed the viewer to a website "to learn more." CP 51. Finally, the content of the VEC ads contained indicia of express advocacy because they took a position on the candidate's character, qualifications or fitness for office. *See* CP 441-42; PDC Br. at 22-25.[4] *See also WRTL II* at *14.

Second, the *WRTL II* Court rejected the mechanical "magic words" test urged on this Court by the VEC and the United States Chamber of Commerce.[5] Application of the test is not dependent on the use of any particular language, and, in some cases, even "contextual factors" can be considered. *WRTL II* at *16, *see also id.* at *17, n. 7 (noting that "magic words" standard was not a constitutional test). This is consistent with the *McConnell* decision, in which the Court noted its "longstanding

[4] Of all the characteristics of the VEC ads, only one is even arguably consistent with the characteristics of the WRTL ads. The WRTL ads "take a position" on an issue, *i.e.*, the senate filibuster. Arguably, the VEC ads take a position against alleged prior practices that candidate Senn engaged in while she was the State Insurance Commissioner. But that similarity is a meager basis upon which to base any comparison of the VEC and WRTL ads.

[5] *See* Amended Br. of Appellants at 16-18, 35 (VEC Br.); Br. of *Amicus Curiae* Chamber of Commerce of the United States at 6.

recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." 540 U.S. at 193. Therefore, while the *WRTL II* test is objective, it is not mechanical as urged by the VEC.

Third, the ads like the VEC's would be subject to regulation under the *WRTL* II test. The Court considered the ads described in *McConnell*, including the so-called "Jane Doe" ads that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think,'" *McConnell,* 540 U.S. at 127, and the "Yellowtail" ad that described a candidate's physical attack on his wife. *Id.* at 194, n. 78. Chief Justice Roberts distinguished the WRTL ads from the "Jane Doe" ads, noting that while those ads "condemned Jane Doe's record in a particular issue," the WRTL ads "do not do so." "[T]hey instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position." *WRTL II* at *15, n.6. Though Chief Justice Roberts did not discuss the Yellowtail ad, the distinctions between it and the WRTL ads are self-evident.[6]

Finally, other "objective factors" compel a determination that the VEC ads are the functional equivalent of express advocacy. Chief Justice

[6] Even the WRTL attorney in oral argument distinguished the WRTL ads from the Jane Doe ads, as well as the "Yellowtail" ad. Tr. of Oral Argument, *WRTL II*, 2007 WL 1211527, at 49 (April 25, 2007) ("We have demonstrated why and their experts have agreed that the Yellowtail ad, the Jane Doe ad, is completely different than our ad.")

Roberts noted that a court "need not ignore basic background information that may be necessary to put an ad in context." *WRTL II* at *16. Objective information about the parties to the litigation and the candidates could include who they are and what they do. The fact that candidate Senn did not hold public office at the time of the election is relevant to a determination of whether the VEC ads legitimately addressed a current public policy issue. Likewise, the identity of the VEC as a "527 corporation" is a factor. The VEC was formed for the specific purpose of influencing elections and, under federal law, must already make some disclosures to the Internal Revenue Service. *See* PDC Resp. to *Amicus* at 6, n. 5, 10; Br. of *Amicus Curiae* Campaign Legal Center at 3, 5-6. The Court should not ignore these objective realities in characterizing VEC's ads.[7]

B. The Express/Issue Advocacy Distinction in *WRTL II* Does Not Apply to State Statutes, Like Washington's, That Do Not Bar Speech but Merely Require Disclosure of Information

WRTL II did not involve a challenge to any of BCRA's disclosure

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[7] Chief Justice Roberts discussed the relevance of timing of the WRTL ads finding that, because the ads dealt with a pending legislative issue, there was a legitimate reason to broadcast the anti-filibuster ads when they did. *WRTL II* at *16. However, here, the VEC identified no pending legislative issue tied to its ad. If the VEC ads were truly issue ads, there was no reason to broadcast them within the two weeks preceding the 2004 state primary election. Therefore, it would be appropriate for this Court to consider timing as an objective factors in evaluating the VEC ads.

While this Court has previously rejected timing as a factor to consider, (*WSRP*, 141 Wn.2d at 267-68), the United States Supreme Court has since considered timing in upholding broadcast restrictions in *McConnell* and in noting the fact that legislative issues were pending in *WRTL II*. *See* CP 112 (chart comparing *McConnell* and *WSRP*).

requirements (BCRA §§ 201, 2 U.S.C. §434), only the burdens on speech imposed during the blackout period, a fact that permeated Chief Justice Roberts' opinion.[8] Therefore, *WRTL II* has no real relevance to the issues raised in this case. In fact, there are ample reasons why this Court should – and why the United States Supreme Court would – treat Washington's disclosure statute differently.

Disclosure requirements have consistently been upheld against First Amendment challenges. *E.g.*, *McConnell*, 540 U.S. at 201; *Buckley v. Valeo*, 424 U.S. 1, 74-81, 96 S. Ct. 612, 46 L. Ed.2d 659 (1976). The Court in *McConnell* reiterated the state interests to uphold BCRA's requirements that corporations disclose the names of those who made contributions to assist in "electioneering communications":

> [T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive

[8] *E.g.*, *WRTL II* at *7 ("[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it."); *11 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), "Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, . . . 'the burden is on the Government to show the existence of [a compelling] interest' . . . ."); *17, n. 7 ("discussion of issues cannot be banned merely because the issues might be relevant to an election"); *17 (discussing the banning of speech in other first amendment contexts); *17, n. 9 (discussing right of speakers to select the content of their message); *20 (summarizing decision, "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban – the issue we *do* have to decide – we give the benefit of the doubt to speech, not censorship"). *See also* Tr. of Oral Argument, *WRTL I*, 2006 WL 164632, at 49, (Jan. 17, 2006) (Justice Kennedy noting that "the difference is this is a content-based inquiry").

electioneering restrictions – apply in full to BCRA.

540 U.S. at 196. The *McConnell* Court responded to the argument that the disclosure requirements would stifle debate.

> Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. . . . Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

Id. at 197, *quoting* 251 F. Supp. 2d at 237. The same is true here: the VEC cannot explain why less information in the political marketplace is better – and constitutionally preferred – than the greater information that disclosure provides.

The VEC has not contested the State's authority to require disclosure in "election-related" matters. VEC Resp. to *Amicus* at 7 ("[V]EC does not contend that the State is prohibited from regulating election-related speech other than express advocacy. VEC merely contends that the State – in the statutory definition of 'political committee' and the PDC's character attack test – has not exercised its power to regulate election-related speech with the requisite specificity.")[9] Indeed,

[9] The VEC admits its ad was election-related. VEC Br. at 42, 46. The VEC argues that because its speech is "election-related", it is entitled to stronger protection under Article I, section 5, of the Washington constitution. VEC Resp. to *Amicus* at 42-

the public interest in disclosure in election cases, as articulated in *McConnell* and *Buckley,* apply to this case as well. That position is well-grounded in law as both the United States Supreme Court and this Court have upheld disclosure requirements in the context of issue-related advocacy, such as lobbying, noting the distinctions between prohibitions of speech and requirements for disclosure. *United States v. Harriss*, 347 U.S. 612, 625, 74 S. Ct. 808, 98 L. Ed. 989 (1954); *Fritz v. Gorton*, 83 Wn.2d 275, 302-311, 517 P.2d 911 (1974).[10] More recently, *McConnell* upheld a disclosure requirement in BCRA § 504, 47 U.S.C. § 315(e), that requires broadcasters to keep records of requests made by anyone to broadcast "'"message[s]' related to a 'national issue of public importance'" or "otherwise relating to a 'political matter of legislative national importance.'" 540 U.S. at 234-43.

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46. The VEC is not entitled to have it both ways – it cannot argue that it is election-related speech when it comes to the Washington constitution, but not election-related speech when it comes to the United States constitution.

[10] *Fritz* is relevant to this discussion in two other respects. First, it defines the link between the interest of the voting public and advocacy of issues by lobbyists to the Legislature. The electorate, we believe, has the right to know of the sources and magnitude of financial and persuasional influences upon government. The voting public should be able to evaluate the performance of their elected officials in terms of representation of the electors' interest in contradistinction to those interests represented by lobbyists. Public information and the disclosure required by section 24, Supra, coupled with that required of lobbyists and their employers may provide the electorate with a heretofore unavailable perspective regarding the role that money and financial influence play in government decision making and other functions performed by public officials. 83 Wn.2d at 309-10. Second, *Fritz* emphasized that "the right to receive information is the fundamental counterpart of the right of free speech. . . . Freedom of speech without the corollary – freedom to receive – would seriously discount the intendment purpose and effect of the first amendment." *Id.* at 296-97.

This Court should not extend any principles it derives from *WRTL II,* applicable to actual limitations on speech that restrict the flow of information to the public, to Washington's statutes that require only disclosure and enhance the amount of information available to the public.

IV. CONCLUSION

This Court should not apply the *WRTL II* analysis developed in the context of content-based prohibition with criminal sanctions to a simple disclosure requirement with only civil remedies. But if this Court deems *WRTL II* relevant, it should find that, under *WRTL II*, the VEC ads, in fact, constitute express advocacy.

RESPECTFULLY SUBMITTED this 13th day of July, 2007.

ROBERT M. MCKENNA
Attorney General

JEFFREY D. GOLTZ, WSBA 5640
Deputy Attorney General
LINDA A. DALTON, WSBA 15467
Senior Assistant Attorney General
CAROL A. MURPHY, WSBA 21244
Deputy Solicitor General
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-9006
Attorneys for Defendants/Respondents, State of Washington, ex rel., Washington State Public Disclosure Commission et al.

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DECLARATION OF SERVICE

I, Melinda Brown, make the following declaration:

1. I am over the age of 18, a resident of Thurston County, and not a party to the above action.

2. On July 13, 2007, I caused to be served a true and correct copy of the Supplemental Brief of Respondent Public Disclosure Commission to:

Counsel for Appellants Voters Education Committee:

John J. White, Jr.
Kevin B. Hansen
Livengood, Fitzgerald & Alskog
121 Third Avenue
PO Box 908
Kirkland, WA 98083
[X] via email (white@lfa-law.com and hansen@lfa-law.com)

ORIGINAL

David Lehn
David Thompson
Charles Cooper
Cooper & Kirk
555 Eleventh Street NW
Washington, D.C. 20004
[X] via email (dthompson@cooperkirk.com)
(dlehn@cooperkirk.com)

Counsel for Intervenor Senn:

Michael E. Withey
Law Office of Michael Withey
601 Union St Suite 4200
Seattle, WA 98101-4036
[X] via email (Mike@witheylaw.com)

C. Steven Fury
Fury Bailey
PO Box 20397
Seattle, WA 98102-1397
[X] via email (steve@furybailey.com)

Counsel for Amicus Curiae Campaign Legal Center:

Hugh Spitzer
Foster Pepper PLLC
1111 3rd Avenue, Suite 3400
Seattle, WA 98101-3299
[X] via email (SpitH@foster.com)

J. Gerald Hebert
Paul S. Ryan
Eva Howe
Campaign Legal Center
1640 Rhode Island Avenue NW, Suite 650
Washington, DC 20036
[X] via email (Pryan@campaignlegalcenter.org)
(Ghebert@campaignlegalcenter.org)

Counsel for Amicus Curiae Chamber of Commerce of the United States:

Harold A. Malkin
Yarmuth Wilsdon Calfo PLLC
IDX Tower
925 4th Avenue, Suite 2500
Seattle, WA 98104-1157
[X] via email (hmalkin@yarmuth.com)

Stephen Bokat
National Chamber Litigation Center, Inc.
1615 H. Street, NW
Washington, D.C. 20062
[X] via email (sbokat@uschamber.com)

Bobby R. Burchfield
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, D.C. 20004-3096
[X] via email (bburchfield@mwe.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of July, 2007 at Olympia, Washington.

Melinda Brown
MELINDA BROWN, Legal Assistant